Autumn Manor, Inc. *and* Dorothy Broz, Maxine Hill, and Sundra Kurtz. Cases 17-CA-10719-1, 17-CA-10719-2, and 17-CA-10719-3

10 November 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 16 February 1983 Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed limited exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Autumn Manor, Inc., Florence, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified:

1. Insert the following as paragraph 2,b, and reletter the subsequent paragraphs.

"b. Expunge from its files any reference to the discriminatory discharge of Sundra Kurtz on 10 November 1982 and notify her, in writing, that this has been done and that evidence of this discharge will not be used as a basis for future personnel actions against her."

2. Substitute the attached notice for that of the administrative law judge.

[1] In adopting the judge's recommendation to dismiss the complaint allegations involving Broz and Hill, we rely on his findings that their testifying before the State Department of Health and Environment had no direct relationship to the working conditions of employees and therefore their conduct did not constitute protected activity. In doing so, we find it unnecessary to pass on the judge's statements concerning whether or not their activities constituted concerted activity.

[2] We shall modify the judge's recommended Order so as to require the Respondent to expunge from its files any reference to the discriminatory discharge of Sundra Kurtz on 10 November 1981 and to notify her, in writing, that this has been done and that evidence of this unlawful discharge will not be used against her. See *Sterling Sugars*, 261 NLRB 472 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT terminate any employees for exercising such rights.

WE WILL offer to Sundra Kurtz immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus enterest.

WE WILL expunge from our files any reference to the discriminatory discharge of Sundra Kurtz on 10 November 1982 and notify her, in writing, that this has been done and that evidence of this discharge will not be used as a basis for future personnel actions against her.

AUTUMN MANOR, INC.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: This case was tried before me at Emporia, Kansas, on September 28-29, 1982, pursuant to a consolidated complaint issued by the Regional Director for Region 17 of the National Labor Relations Board on August 5, and which is based on separate charges filed by Dorothy Broz, Maxine Hill, and Sundra Kurtz,[1] individuals (Broz, Hill, and Kurtz), on November 16 and November 20, 1981.[2]

[1] This case has been corrected to reflect the correct spelling of Kurtz' first name. See her spelling in the transcript as well as her signature on the charge form.

[2] All dates herein refer to 1981 unless otherwise indicated.

The complaint alleges that Autumn Manor, Inc. (the Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act).

Issues

1. Whether or not it is a violation of the Act to discharge employees such as Broz and Hill for testifying in a state health department relicensing hearing.

2. Whether the Respondent discharged employee Kurtz for inquiring about the reasons for the discharge of Broz and Hill and thereby violated the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of both the General Counsel and the Respondent.[3]

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE RESPONDENT'S BUSINESS

The Respondent admits it is a Kansas corporation operating the nursing home in question at Florence, Kansas; it further admits its annual gross volume of business exceeds $100,000 and that it annually purchases goods and materials valued in excess of $5,000 which originate from sources outside Kansas. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Florence facility is one of four nursing homes owned by the Respondent at various locations in Kansas. The pleadings describe Harold Chapman as the "owner." At material times the administrator at Florence was Chlodine Fisher. While the exact nature of the patient population at the Respondent's Florence facility is not clear, it apears that for the most part it provides residential care for elderly patients, at least some of whom are mildly mentally ill. It can be inferred from the record that others are in various stages of senility or unable to care for themselves. To care for these patients the Respondent's staff consists principally of nurses, nurses aides, social and recreational personnel, and food service employees. It is not necessary, for the purposes of this case, to describe the administrative hierarchy within the Florence operation as it relates to the direction of employees in their duties. Two of the alleged discriminatees, Broz and Kurtz, are nurses aides. Hill was the "social service designee."

Broz was the most experienced of the three, having been hired in 1974, leaving after 18 months, and being rehired in 1978. Her employment was then continuous, until November 9, 1981, when she was discharged. Hill, prior to her discharge on the same date, had been employed for about 4 years. The first two were as activities director and the last two as the social service designee. Kurtz is a young woman in her early 20's. She was initially hired in July 1980 and worked until approximately December of that year when she left. She was rehired in October 1981 and worked as a full-time nurses aide until November 10. She worked approximately 5 weeks during her last period of employment. All three were paid the minimum wage. There is no evidence that they were licensed personnel. The aides' duties were primarily to feed and bathe patients.

As a nursing home the Respondent is licensed and regulated by a state agency, the Kansas Department of Health and Environment. That department receives and investigates complaints regarding the delivery of patient care at health institutions in the State. Furthermore, it routinely monitors and considers the quality of patient care on license renewals which must be sought annually.

B. *Broz and Hill*

1. Facts relied on by the General Counsel

Sometime in March the Department of Health and Environment, having received some complaints—apparently from a patient's family—notified the Respondent that it would conduct an investigation.[4] In April Administrator Fisher and Owner Chapman conducted a staff meeting regarding the investigation. There is little evidence in the record regarding what occurred at the meeting, but I think it is fair to say that the Respondent sought information on the course of the investigation, including incidents which might be scrutinized. He also sought suggestions from employees regarding improving the operation.

There is nothing specific in the record showing the status of the State's investigation between March and August. However, apparently on June 30, Fisher called another staff meeting at which she accused employee Judy Fulton of being an instigator, saying she considered Fulton a troublemaker because she had talked to the State, even though she knew it was at the State's request. Fulton described to me the meeting she had had in March with a state investigator at a restaurant.[5] The investigator, Ms. Jerry Pittsenberger, had a list of complaints, asked Fulton if she had any knowledge regarding them, and asked how director of Nursing Anita Hoffman handled herself with employees and residents. She also asked Fulton how money was handled. The investigator asked Fulton how Food Service Supervisor Twylah Nightengale got along with employees; she had questions regarding whether Nightengale had exceeded her authority as food supervisor by injecting herself into the duties of other departments. She also asked about timesheets and scheduling.

[3] The Respondent filed a motion to file its brief out of time. In the absence of opposition the motion has been granted.

[4] According to Owner Chapman, notices of complaints are routinely given. He also testified to the effect that such investigations are relatively common.

[5] Two former employees were also present at the restaurant with the investigator, Jonetta Carr and Marge Branson.

The next day Fulton reported to Fisher what had transpired. Fisher asked her to list, as best she could, those questions which the investigator had asked. After checking with Pittsenberger and obtaining permission, Fulton did so. Thereafter, according to Fulton, a day did not pass without Fisher making some remark to her regarding the investigation. On June 30, the day of the meeting, Fulton was discharged.

Fulton's discharge, together with the discharge of Nancy Soyez, was the subject of an unfair labor practice complaint which was settled and severed on the first day of this hearing. That agreement contained a nonadmission clause. The General Counsel's theory regarding those two discharges was that the Respondent fired them because they had engaged in the protected concerted activity of banding together with other employees and holding meetings to discuss wages, hours, and terms and conditions of employment. That theory is significantly different from the theory the General Counsel advances with respect to Broz and Hill.

Broz and Hill were not involved in any of the foregoing matters. It was not until late August when, according to Broz, she contacted another state investigator, Bonnie Conyers of the Social Rehabilitation Service, by telephone. While Broz did not explain what prompted her to make the telephone call, she appears to have been concerned about incidents involving the treatment of patients which she believed should be called to the attention of the Social Rehabilitation Service. She had become aware that Convers was conducting an investigation. The telephone conversation was never revealed to the Respondent.

Broz testified she told Conyers of two incidents. On one occasion she had observed Administrator Fisher, to induce a patient to get out of bed, threaten to burn the patient's religious articles while making the patient watch. The second incident involved Director of Nursing Anita Hoffman. Broz said that she had heard a patient ask Hill to write a letter for her, but Hoffman intervened telling the resident in profane terms that Hill was not be write the letter and the patient should go to her room.[6]

There is no evidence regarding any similar effort by alleged discriminatee Hill to contact the State.[7] However, Administrator Fisher testified that Conyers had asked to meet with the heads of each department and that Hill, as the social service designee, was one of those individuals. Fisher later asked Hill to describe her conversation with Conyers.

There is no evidence that either Broz or Hill was aware of each other's involvement in the investigation or that they had the interest of employees in mind when they spoke to the investigator.

In late October both Broz and Hill were subpoenaed by the Department of Health and Environment to testify at a November 2 hearing to determine whether or not the Respondent's Florence facility should be relicensed. Both did so and appear to be the only two rank-and-file employees who gave testimony.

Broz testified about the two incidents described above. Hill testified that one of her duties was to write letters for residents. In addition, she described several incidents which she had observed. She said in August she had seen Administrator Fisher twice "smack" a resident on the back and push her to her room because the patient repeated vulgarities. She testified there were times when she delivered to residents mail which had already been opened and one resident needed permission from Fisher before sending letters. She described an incident where she had seen Fisher distribute cookies belonging to one resident to other residents. She said that employees had commonly "yelled" at residents but the practice had recently diminished. Furthermore, patients were now being permitted a greater amount of freedom to leave the home and were being offered coffeebreaks. Finally, she described an incident in which a patient had left the facility without permission, had returned, and had been "frisked."

With respect to her own qualifications, Hill testified during the DHE hearing that prior to taking the job she had no previous background in social service and had been given no specific orientation for it although she held the position for 2 years at the time of her testimony and had served as activity director for 2 years before that. She testified that once a week she met with department heads to discuss care plans and a social service consultant came to the home about once a month to discuss such plans with her. It should be observed that Hill, whose duties were part time in any event, had been reduced from 3 days per week in July and August to 1 day per week in September and October. She testified about her reduced hours as well.

Both Broz and Hill testified on November 2. Both were discharged on November 9, exactly 1 week later. Broz had normally worked 3 days per week at that time, but had not been scheduled to work at all during the week of November 2. Likewise, Hill had not been scheduled during that week either.

2. Analysis and conclusions

Upon the foregoing facts the General Counsel asserts that he had made out a prima facie case that the Respondent discharged Broz and Hill because they gave testimony to the Kansas Department of Health and Environment and that such a discharge violates Section 8(a)(1) of the Act. I agree that the evidence constitutes a prima facie case that the Respondent discharged Broz and Hill because they gave such testimony. However, I shall not analyze the facts adduced in defense nor shall I make specific factual findings resolving the two versions because I conclude that even if that is the case such conduct nevertheless does not violate Section 8(a)(1) of the Act.

[6] The date of these incidens which appear to have occurred on the same day is unclear. Broz testified she reported them to Conyers in August 1981. Her testimony before the DHE on November 2 describes the incidents as having occurred in September. Did she mean September 1980 or was she incorrect regarding the date of her telephone call to Conyers?

[7] Hill did not testify in this proceeding despite having filed her own charge and despite having been subpoenaed by the General Counsel. Indeed, according to the Respondent's counsel, Hill also failed to appear at the Board's Regional Office prior to trial to discuss possible settlement.

Usually a protected concerted activity case requires an initial analysis of whether or not the conduct is concerted, followed by an analysis of its protected status. I shall deviate from this methodology here and simply assume arguendo that Broz and Hill were engaged in concerted activity when they testified before the DHE pursuant to its subpoena. There are in fact real doubts concerning the concerted character of their testimony. The analysis would be difficult and would probably raise more questions than answers. Since the ultimate outcome depends on the protected status question, which will require dismissal whether or not "concert" can be found, there is little point in deciding the first issue.[8]

In support of his contention that such a discharge violates Section 8(a)(1), the General Counsel relies principally on the Board's decision in *Misericordia Hospital Medical Center*, 246 NLRB 351 (1979), enfd. 623 F.2d 808 (2d Cir. 1980). In that case the Board found a hospital to have violated Section 8(a)(1) of the Act by discharging a nurse, one Cafaro, who had participated in an ad hoc committee which had made an unfavorable report to the "Joint Commission on Accreditation of Hospitals." That commission was not a governmental agency, but had a legal duty to survey hospitals to determine whether or not they were meeting the standards of care mandated by law. The ad hoc committee report which the Joint Commission received was the result of a collaboration by several physicians and nurses. Its report began by accusing the hospital of "serious deficiencies in the quality of care" at the hospital. That was followed by a description of the various incidents which had led the members of the ad hoc committee to their conclusion.

As can be seen there are immediate differences between *Misericordia* and the instant case. First, in *Misericordia*, the dischargee had joined with other employees, at least nurses, if not physicians, in a traditional concerted act, the formation of a committee and the drafting of a report. Nothing like that occurred in the instant case. Neither Broz nor Hill was ever involved in any group activity. The only way their conduct may be considered concerted is if communicating with the state health department is a concerted act in and of itself.

Next, employee Cafaro's conduct in *Misericordia* was purely voluntary, something she wished to do by virtue of her perception of performing some public good. In contrast to that, both Broz and Hill were subpoenaed to appear, on an involuntary basis, before the department's hearing. It is probably true that Broz had motivations somewhat similar to those of Cafaro when she telephone the state investigator. But there is no evidence that the Respondent had any knowledge or even any idea of Hill's purpose except that it knew Hill had responded to a routine request from the department. No evidence has been adduced that Hill had any motive other than to cooperate as the Respondent had requested.

Even if Broz and/or Hill harbored altruistic or any other motives for giving their testimony, the Respondent could not have know it. All it knew was that both individuals had, pursuant to a subpoena, given testimony describing in factual terms incidents about which the department wished to know. Moreover, even if it can be assumed that the employees' motives were designed to improve patient care, the principal altruistic motive which the Respondent might have presumed,[9] it does not follow that the Respondent would view their testimony as aimed at the improvement of working conditions of the employees at the home. Their testimony had nothing to do with working conditions per se.

Indeed, neither Broz nor Hill gave any specific testimony regarding conditions at the home as they impacted employees directly. Thus, it may reasonably be concluded that during the investigative stage they were not asked to describe such matters to the department and did not do so. Furthermore, it is unlikely that the department would be particularly concerned about the working conditions of employees or take the employees' part in the consideration of such matters. The department's statutory mandate deals with patient care, not the rights of employees. (See Kan. Stat. Ann. Ch. 39, Art. 9.) That law gives the department no authority directly to regulate the working conditions of employees in nursing homes. To the extent that the State exercises such authority, it is through an entirely different department, the Department of Labor, and its authority is set forth in the Kansas Labor and Industry Code.

The General Counsel concedes that Broz and Hill's testimony before the department had no direct impact on working conditions. He nonetheless argues that there is an indirect impact. He asserts that patient abuse, left uncorrected, could cause patients to become resentful and more difficult to handle. Whether that argument would prevail in other fact patterns, it is not supported by the record here.

Both Broz and Hill testified to specific incidents which they had observed while employed at the Respondent. Examples were allegedly slapping a balky patient on the back, monitoring outgoing mail, prohibiting an employee

[8] Without attempting to decide whether Broz and Hill's mandated testimony to the DHE is concerted the following item would need to be considered. Should the syntax of Sec. 7 delineating an element of employee voluntarism in the conduct be literally applied? A strong argument can be made that activities protected by Sec. 7 of the National Labor Relations Act, i.e., the right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" must be matters of the employees' own choice. In other words, the Act seems to protect employees who choose to seek mutual aid or protection for themselves and other employees, contemplating an employee using his or her own free will to engage in conduct seeking such an end. Sec. 7 does not, by its own grammar, concern itself with the volition of another entity, such as a court or an administrative agency exercising subpoena power. A subpoena, by its own nature, is a form of legal compulsion requiring an individual to become a witness whether or not he or she wishes to do so. As Broz and Hill were acting under a legal compulsion their own volition was not involved. Thus the element of self-will suggested by Sec. 7 of the Act may not be present.

Moreover, one would need to inquire about the "substituted concerted activity" concept—the legal fiction that it is a concerted act for one employee to go to a governmental agency. (See *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and its progeny.) While the Board has had no difficulty in finding concert when an employee goes to an agency having regulatory authority over working conditions (i.e., OSHA, health departments, labor departments, workmen's compensation agencies, legislative bodies, etc.), many of the appellate courts have. Moreover, it is less than clear that concert is involved when the agency has no authority over working conditions. Complaints to some third parties or agencies (i.e., the police department) may not affect working conditions at all.

[9] Chapman's actual perception was that the testimony threatened the Respondent's existence as menacing its license.

from writing a letter for a patient, distributing cookies belonging to a patient to other patients, and similar incidents. Many of these incidents may have been perfectly justifiable. Hill did not testify that the patient whose back was slapped was injured or in any way harmed. It may have been that the patient was mentally ill in a manner requiring a certain amount of attention-getting and that such treatment was medically acceptable. Likewise monitoring the mail of mentally ill patients may be desirable depending on the nature of that individual's illness. Similarly, with respect to the cookies, the recipient may have given permission or was unable either to consume them or otherwise give permission; if the cookies were not eaten by somebody they may have gone unenjoyed altogether.[10]

Neither I nor the Board is in any position, particularly on the slender nature of this record, to determine whether such action was justifiable. It may well be that the conduct was inappropriate. However, only an agency with expertise in that field would know. It seems unlikely that Broz as a nurses aide or Hill as a social service designee would be in a position to know. Neither had medical, psychiatric, or managerial training or experience. Their duties were hygienic. In contrast the two individuals who were accused of the misconduct were Administrator Fisher and Director of Nursing Hoffman. These individuals were in position of both knowledge and authority regarding such matters. The appropriate agency to evaluate the Broz-Hill reports against the Fisher-Hoffman explanations would be the state agency regulating such conduct, not the Board. Thus, when the General Counsel argues that these incidents might have an impact on working conditions, he is simply engaging in speculation, for these incidents, if they occurred, may have been within accepted standards of residential care. If so, the Board should not attempt to second guess the Department of Health and Environment which has expertise in this field and assume a detrimental impact on the working conditions of employees. In the final analysis the Board cannot know whether this conduct would result in adverse working conditions for employees. And, if it cannot know, it cannot simply assume it. Thus, the General Counsel fails in his proof that these incidents, if uncorrected, would have an adverse impact on employees' working conditions.

However, it is argued that *Misericordia*, supra, together with the Board's decision in *Reading Hospital*, 226 NLRB 611 (1976), requires such an assumption and that indirect impact, even if only potential, is enough to gain the Act's protection. Yet, *G & W Electric Specialty Co.*, 154 NLRB 1136 (1965) (Member Jenkins dissenting), enf. denied 360 F.2d 873 (7th Cir. 1966), cited by the General Counsel, sets forth a rule which appears severely to damage his own argument. At 1137 of that decision the Board says that Section 7 protection may be extended to activity which is "close enough in kind and character, and bears such a reasonable connection to matters affecting the interest of employees *qua* employees, as to come within the general reach of the 'mutual aid and protection' the statute is concerned to protect." If the proper test is that which is cited in *G & W Electric Specialty*—that is, the interest must be employee qua employee,[11] Hill and Broz's situations fall short. They were not engaged in employees qua employee conduct but in employee qua patient conduct. Thus, the case instead of supporting the General Counsel actually supports the Respondent.[12]

Even so, the General Counsel argues that in *Misericordia* and *Reading* the nurses involved in those cases were also engaged in employee qua patient activity, but the Board nonetheless found it to be conduct protected by Section 7. First, I note that *Misericordia* contains an element ignored by the General Counsel and to some extent by those decisions which discuss the meaning of *Misericordia*.[13] In that case the nurse in question, Cafaro, in addition to her activities on behalf of the ad hoc committee, was also engaged in union organizing. That fact was to some extent subordinated to the concerted activity issues in the case, but for precedental purposes cannot be ignored. Recently the First Circuit described *Misericordia* as having occurred in the context of "a labor dispute." See *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634 (1st Cir. 1982), where that court said: "Although some of the complaints were directed at managerial policies outside the scope of working conditions, the [Second Circuit] found sufficient nexus with a *labor dispute* to hold that the activity was protected." (Emphasis added.) I find such a comment significant in analyzing the scope of *Misericordia* for it demonstrates that the ratio decidendi of that case is somewhat elusive.

Assuming, however that *Misericordia* was decided on concerted activity grounds rather than labor dispute grounds, there are still some significant differences between that case and the instant one. In *Misericordia* the ad hoc committee's complaints were said to be directly related to the level of staffing at the hospital and the number of patients per staff member. A similar concern was raised in *Reading Hospital*, supra. There has been no showing of such a concern here. The incidents which Broz and Hill described to the Department of Health had nothing to do with the number of staff members required to carry out the home's mission of patient care.

[10] The alleged threat to burn religious articles does not appear to fall within the category of justifiability.

[11] The test is consistent with similar language of the Supreme Court in *Eastex, Inc. v. NLRB*, 437 U.S. 556 at 565–568 (1978).

[12] The Board's recent decision in *Carpenters Local 35*, 264 NLRB 795 (1982), is somewhat confusing regarding the protected status of the conduct. *Carpenters* was decided 1 day after the instant hearing closed and has not been cited by either party, no doubt due to normal delays in dissemination. There the Board (Member Fanning dissenting) found a violation of Sec. 8(a)(1) when the employer, a union, discharged two assistant business agents for reporting financial and election irregularities to the Department of Labor as possible violations of the Labor Management Reporting and Disclosure Act. The Board panel majority found their report to be both concerted and protected but, in reply to the dissent, also found it to be protected intraunion conduct. It did not directly apply the *G & W Electric Specialty* rule to determine the protected status of the concerted conduct. (Member Fanning's dissent, though not clear on the point, may have been an effort to do so.) To the extent that *Carpenters Local 35* is inconsistent with *G & W Electric Specialty* and *Eastex*, I decline to follow it for the case can be interpreted as decided on other grounds.

[13] E.g., Member Fanning's dissent in *Carpenters Local 35*, supra, referring to the "staffing levels" issue.

Neither did it relate to other working conditions traditionally accepted by the Board as protected: safety, health, wages, supervisory authority, etc.

Finally, the General Counsel argues that state law imposes a duty on nursing home employees to report patient abuse or neglect to the appropriate state agency, and that such a duty to report is a condition of employment. Assuming that to be the case,[14] I fail to see its materiality. Section 7 rights stand on their own and are protected for what they are. They are not increased in either number or stature by a state-imposed working condition. The touchstone remains: Are the employees attempting to improve working conditions via employee qua employee conduct? Accordingly, I do not concern myself further with state law as somehow bettering Broz and Hill's standing under Section 7.

Therefore, I am unable to conclude, as the General Counsel urges, that Section 7 protects employees who testify in aid of a state regulatory agency performing its functions where that agency has no direct relationship to regulating the working conditions of employees. It follows, therefore, that Broz and Hill had no Section 7 protection when they testified factually before the State Department of Health and Environment in order to assist that agency in carrying out its legislative function. Accordingly, the complaint should be dismissed insofar as it relates to the allegations involving Broz and Hill.[15]

C. *Kurtz*

1. The facts

The facts relating to Sundra Kurtz' discharge are quite simple. As noted previously, she had been initially hired as an aide in July 1980 and worked for several months before leaving her employment without explanation. Administrator Fisher rehired her in October 1981 and she worked until November 10 when she was discharged. On November 9, Chapman and Fisher conducted a meeting of employees regarding, among other things, the DHE licensure hearing which had been held a week before. It was on the day of the meeting that Chapman had discharged Broz and Hill and that decision had become common knowledge among the employees. During the meeting, Kurtz, at Chapman's invitation to ask questions, asked why Broz and Hill had been discharged. When Chapman told her Hill had been discharged because she was not qualified for her job, Kurtz expressed disbelief saying Hill "must have been qualified" because she had worked for the Respondent for over 5 years.

Chapman, who did not know Kurtz, thereupon asked Fisher for her name. He then asked Kurtz if she was one of the people who gossiped about the Respondent behind closed doors. Without waiting for Kurtz' answer, he said, "That's the reason why [Broz] was fired."

Chapman, concededly, was annoyed with Kurtz' question as well as her expression of doubt regarding the reason he advanced for Hill's discharge. He admitted he directed Fisher to pull Kurtz' personnel file with the intention of finding something to justify discharging her. That search revealed a number of shortcomings, but Administrator Fisher agreed she would not have fired Kurtz without having been instructed to do so by Chapman. The shortcomings on which Chapman now relies include such things as Kurtz' failure to comply with the dress code; i.e., occasionally wearing blue jeans instead of loose-fitting pants, her attendance, her failure to promptly obtain a tuberculin test on her employment, and some minor incidents supposedly involving patients about which the Respondent's proof is very weak. All of these things were dredged up immediately after Kurtz questioned Chapman at the November 9 meeting. I have no difficulty in concluding that had Kurtz not asked her questions Chapman would not have begun searching for excuses to discharge her.

2. Analysis and conclusions

Having concluded that Kurtz was discharged because she asked questions regarding the Respondent's reasons for discharging Broz and Hill, followed by a suggestion that the reasons could not be true, the only question which remains is whether or not that conduct violates Section 8(a)(1) of the Act. I conclude that it does. The Board has held on numerous occasions that Section 7 of the Act protects employees who, in the presence of other employees, question their employer regarding terms and conditions of employment. Quite clearly such questions are directed at determining what those conditions are so that, if necessary, employees may intelligently assess the need to engage in activities for their mutual aid or protection. Stifling such questions interferes with the right. See, for example, *Prescott Industrial Products*, 205 NLRB 51 (1973); *Markle Mfg. Co.*, 239 NLRB 1353, 1354 (1979); *Howell Metal Co.*, 243 NLRB 1136 (1979); *Pepper Packing Co.*, 243 NLRB 215 (1979). Cf. *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287 (5th Cir. 1980). It follows that the Respondent violated Section 8(a)(1) of the Act when on November 10 it discharged Kurtz.

III. THE REMEDY

Having found that the Respondent has engaged in violations of Section 8(a)(1) of the Act by discharging its employee Sundra Kurtz for exercising her Section 7 right to inquire about the terms and conditions of employment, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include an order requiring the

[14] In fact the Kansas law does not impose such a condition on unlicensed personnel such as nurses aides or social designees. It does do so for licensed healing arts personnel. (See Kan. Rev. Stat., sec. 39-1402.)

[15] I have deliberately made no factual findings regarding the reasons Broz and Hill were actually discharged, although I have earlier agreed that the General Counsel has made out a prima facie case that they were discharged because they gave the testimony. I refrain from making such findings here because, in my view, to do so would be overstepping my authority under the Act by suggesting findings which the State may wish to make for itself. Both it and the employees involved have the right to file suit under Kansas law and ultimate findings, if any, should be made by the Kansas court system rather than the Board. (See Kan. Rev. Stat., sec. 39-1403(b).):

> No employer shall terminate the employment of, prevent or impair the practice or occupation of or impose any other sanction on any employee solely for the reason that such employee made or caused to be made a report under this act.

Respondent to immediately offer Kurtz reinstatement to her former job or, if it no longer exists, to a substantially equivalent job, and to make her whole for any loss of pay she may have suffered by reason of the discrimination aganist her. Backpay and interest thereon shall be computed on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. The Respondent, Autumn Manor, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act when on November 10, 1981, it discharged its employee Sandra Kurtz because she engaged in activities protected by Section 7 of the Act.

3. The Respondent did not violate Section 8(a)(1) of the Act when on November 9, 1981, it discharged its employees Dorothy Broz and Maxine Hill.

On the basis of the foregoing findings of fact and conclusions of law, and upon the entire record[16] in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER[17]

The Respondent, Autumn Manor, Inc., Florence, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they ask questions regarding the terms and conditions of their employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately offer Sundra Kurtz reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or any other rights and privileges and make her whole, with interest, for lost earnings in the manner set forth in that section of this Decision entitled "The Remedy," dismissing, if necessary, any employee who replaced her.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all of the records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Florence, Kansas facility copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by its authorized representative, shall be posted immediately upon receipt and maintained for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the remainder of the complaint be, and hereby is, dismissed.

[16] If any independent 8(a)(1) violations may be seen from this record, the parties are in agreement that they have been remedied by the settlement agreement in Cases 17-CA-10470-1 and 17-CA-10470-2 now closed on compliance.

[17] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."